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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 179

WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANT

v.

ALDO MARIO BELLEI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinions of the district court granting appellee's motion for summary judgment (A. 15–26) are reported at 296 F. Supp. 1247.

JURISDICTION

On May 22, 1969, a three-judge district court, convened pursuant to 28 U.S.C. 2282, entered its judgment (A. 27) declaring that Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), is unconstitutional. A notice of appeal was filed in the district court on May 23, 1969, and probable jurisdiction was noted October 13, 1969. Jurisdiction over this direct appeal is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether either the Due Process Clause of the Fifth Amendment or the Citizenship Clause of the Fourteenth Amendment deprives Congress of the power to attach to the statutory grant of citizenship to a person born abroad of one citizen-parent the condition subsequent that, in order to retain such citizenship, he must come to this country and live here for five years before attaining the age of twenty-eight.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent Constitutional and statutory provisions are set forth in Appendix A, *infra* pp. 43–46.

STATEMENT

Appellee filed this action seeking declaratory and injunctive relief against the operation of Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), on the ground that the section's provision for loss of citizenship is unconstitutional.[1] The facts were stipulated, and the properly convened three-judge district court granted appellee's motion for summary judgment, holding the statute void and confirming his continued American citizenship.

1. Appellee's father has always been a citizen of Italy and has never acquired United States citizenship. His mother was born in the United States and has always

[1] The action was originally filed in the United States District Court for the Southern District of New York, but because venue was not proper there, see 28 U.S.C. 1391(e), the suit was transferred to the District Court for the District of Columbia pursuant to 28 U.S.C. 1406(a).

been, by American law, an American citizen. A few days after his parents' marriage in the United States on March 14, 1939, they left for Italy, where appellee was born on December 22, 1939. The family has since resided there.[2]

At the time of his birth in Italy appellee became, and still is, a citizen of Italy. Under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, he also acquired United States citizenship at his birth abroad to an American citizen. That statute also then provided that in order to retain the United States citizenship acquired under such circumstances, appellee had to come to the United States and reside here for at least five years immediately prior to his eighteenth birthday and take an oath of allegiance to the United States after he reached the age of twenty-one. These requirements were liberalized somewhat by the Nationality Act of 1940 (Section 201(g), 54 Stat. 1139), and were further relaxed by Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), which provides that a person born abroad to one American parent after May 24, 1934 (see Section 301(c)), may retain his citizenship by residing in the United States for five continuous years sometime between his fourteenth and twenty-eighth birthdays.[3]

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[2] The facts summarized in the above paragraph and in the three succeeding paragraphs appear in the Stipulation of Facts, agreed to by the parties, which is set forth at A. 5–12.

[3] Absences from the country for an aggregate of less than twelve months do not break the continuity of the five-year residence required. See Section 301(b), Immigration and Nationality Act, as amended, 8 U.S.C. 1401b.

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2. For most of his life appellee has lived in Italy, the country of his birth. Recently he took up residence in England. Although he has come to the United States on five brief visits, appellee has never established residence in this country. Therefore he admittedly failed to comply with the conditions for retention of his American citizenship as prescribed in the 1934 Act which conferred American citizenship on him, or with the more generous provisions of subsequent statutes.

On his first two trips to the United States, in 1948 and 1951, appellee traveled on his mother's American passport. On his next trips in 1955 and 1962, he traveled on his own United States passport, which was periodically renewed until December 22, 1962, his twenty-third birthday. In connection with the last two renewals of his passport, he was expressly advised of the need to establish residence in the United States prior to his twenty-third birthday if he wished to retain his United States citizenship. When he failed to do so, the Department of State notified him that he had lost his United States citizenship. Appellee used his Italian passport in 1965, when he was admitted to the United States as an alien visitor.

3. In this suit appellee contended that the conditions for retention of his citizenship prescribed by Section 301(b) of the Immigration and Nationality Act are unconstitutional, and therefore that he had not lost his citizenship. On February 28, 1969, a three-judge district court granted appellee's motion for summary judgment, finding Section 301(b) invalid under the authority of *Afroyim* v. *Rusk*, 387 U.S. 253, and *Schneider* v. *Rusk*, 377 U.S. 163.

SUMMARY OF ARGUMENT

I

The court below was mistaken in its reliance on *Afroyim* v. *Rusk*, 387 U.S. 253. *Afroyim* found that citizenship status established under the Fourteenth Amendment is protected by that Amendment unless it is voluntarily relinquished by the citizen. Since appellee was not "born or naturalized in the United States" his status is not dealt with in the Fourteenth Amendment, but depends entirely on Congressional grant. As this Court noted in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 688, the Fourteenth Amendment "has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it always has been, by Congress * * *." Moreover, *Schneider* v. *Rusk*, 377 U.S. 163, prohibited only arbitrary or discriminatory termination of citizenship status. It did not preclude the imposition of reasonable conditions, in situations not governed by the Fourteenth Amendment.

As this Court pointed out in *Montana* v. *Kennedy*, 366 U.S. 308, 312, children born abroad to American parents have no constitutional claim to citizenship, since the legislative dispensation is "the sole source of inherited citizenship." Congress unquestionably can impose conditions limiting the transmission of citizenship to children born abroad. Thus, our statutes have always prescribed conditions precedent, limiting the right to transmit citizenship to

parents who have previously resided in the United States. Similarily, Congress could have deferred the vesting of citizenship for appellee until he established residence in the United States. The Congressional power is not lessened by Congress' generosity in granting citizenship benefits to such a child from birth upon condition that he shall retain such citizenship only if he establishes residence in the United States at maturity.

II.

The supposition that the rights of citizenship cannot be limited in any way is erroneous. Thus a foreign born citizen cannot transmit citizenship to his children unless he establishes residence in the United States. Moreover, citizenship through naturalization can subsequently be rescinded if it was obtained through fraud.

The requirement that a dual national born abroad must demonstrate his election of United States citizenship by residence in this country is reasonable. The legislative history of the 1934 legislation that first gave American mothers equal right with American fathers to transmit citizenship and also imposed residence requirements upon children thus receiving citizenship reflects reasonable apprehension that a child born abroad to an American mother and an alien father could be reared in an alien environment and might actually have no loyalty or attachment to the United States. Residence has generally been a criterion of allegiance, and is for example, a requirement for naturalization. The requirement that foreign born dual nationals must make an election by establishing

residence in the parent country is endorsed by scholarly opinion and by the laws of many countries, and even the court below conceded its reasonableness.

Appellee is a person of dual nationality who has deliberately failed to comply with the conditions prescribed by Congress for retention of his citizenship. There is no requirement that he be permitted to keep two citizenships, using each when it serves his purpose. Indeed, in failing to make the required election of United States citizenship after maturity, petitioner may have voluntarily relinquished or abandoned such citizenship within the concepts expressed in *Afroyim* v. *Rusk, supra.* However, it is unnecessary to resolve that question, since this case does not involve Fourteenth Amendment citizenship and therefore petitioner can be held to compliance with the reasonable condition imposed by Congress in granting him citizenship.

ARGUMENT

I. SINCE APPELLEE WAS NOT BORN OR NATURALIZED IN THE UNITED STATES, HIS CITIZENSHIP IS GOVERNED NOT BY THE FOURTEENTH AMENDMENT BUT BY A STATUTORY GRANT THAT CAN BE SUBJECTED TO REASONABLE CONDITIONS

A. THIS CASE IS NOT GOVERNED BY *AFROYIM* V. *RUSK* OR *SCHNEIDER* V. *RUSK*

In striking down Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), the court below relied primarily on this Court's decision in *Afroyim* v. *Rusk,* 387 U.S. 253. The court considered that *Afroyim* precluded the imposition of any conditions restricting the retention of citizenship, however reasonable they might be and regardless of the manner in which that citizenship was obtained. We submit that this view mis-

reads *Afroyim*, and misconceives the nature and limitations of Congressional power in legislating for the acquisition of United States citizenship by persons born abroad to United States citizen parents.[4]

The basic premise of *Afroyim* was that citizenship sheltered by the Fourteenth Amendment is protected against "forcible destruction" by the government (387 U.S. at 268), and is retained unless the citizen voluntarily relinquishes it. The relevant provision of the Fourteenth Amendment is its first sentence (the Citizenship Clause), which declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States * * * ." Afroyim had acquired citizenship through naturalization, and the Court defined the issue before it as

> whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. [387 U.S. at 256.]

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[4] The Department of State has found that 661 persons lost their United States citizenship under Section 301(b) during fiscal years 1964–1968. The Immigration and Naturalization Service has under consideration about 25 cases in which possible loss of United States citizenship under that section is involved. The Department of State estimates that several hundred such cases are pending throughout the world in the various consular offices of the United States. This issue is also in litigation in *Vincente Gonzalez-Gomez* v. *Immigration and Naturalization Service*, E.D. Calif., Civ. No. F–151, where the court on June 17, 1969, upheld the constitutionality of the statute, disagreeing with the court below. Its brief opinion, as yet unreported, is reproduced as Appendix B, *infra*, pp. 47–49. We are informed that plaintiff in that case is appealing and will submit an *amicus* brief herein.

The Court resolved this question by explaining that

> [t]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, *this Fourteenth Amendment citizenship* was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. [387 U.S. at 262; emphasis added.]

Throughout its opinion in *Afroyim* the Court emphasized that it was dealing with Fourteenth Amendment citizenship and enforcing the safeguards found in the Citizenship Clause. 387 U.S. at 262, 263, 268.

Appellee was not "born or naturalized in the United States" and thus his citizenship status is not within the ambit of the Fourteenth Amendment. Since he acquired citizenship at birth outside the United States his status is dependent entirely on Congressional grant. As we shall show, such legislation, conferring citizenship benefits on children born abroad to American citizens, long antedated the Fourteenth Amendment. It seems obvious from its language and purpose that the Fourteenth Amendment was not designed to interfere with such legislative grants of citizenship. As the Court explained in *United States* v. *Wong Kim Ark,* 169 U.S. 649, 688:

> This sentence [the Citizenship Clause] of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States", and "subject to the jurisdiction thereof"—in short, as to everything relating to

> the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it always has been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

While recognizing that there may be more than one Constitutional source for citizenship rights, the court below erroneously read *Afroyim* as establishing a pervasive "due process protection to citizenship". 296 F. Supp. at 1251. There is no mention of due process in *Afroyim*, and this Court manifestly did not desire to rest its decision on due process requirements.[5]

We doubt also the lower court's assumption that Section 301(b) is an expatriation statute. *Afroyim* was expressly concerned with the power of Congress to "expatriate" American citizens against their will. Section 301(b), in common with like provisions of earlier statutes, appears in the portion of the Act dealing with the *acquisition* of citizenship, while the expatriation provisions, relating to citizenship acquired by birth or naturalization, appear in the portion of the Act beginning with Section 349, 8 U.S.C. 1481. Congress evi-

[5] In response to requests by the Department of State and the Immigration and Naturalization Service for guidelines to be followed in light of *Afroyim*, the Attorney General on January 18, 1969, issued a Statement of Interpretation which was expressly made inapplicable to loss of citizenship under Section 301(b), here involved. 34 Fed. Reg. 1079. The Statement also notes that the "ultimate determination" of the effect of the broad language in *Afroyim* must be left to the courts.

dently did not regard Section 301(b) as concerned with expatriation. The conditions for retention of citizenship in Section 301(b) are included in the original grant of such citizenship by Congress, and are prescribed as an inherent segment of the grant. We do not agree that requiring fulfillment of the condition originally prescribed by Congress is a "forcible destruction" of a constitutionally protected citizenship. And we question whether appellee can claim the citizenship granted by Congress while repudiating the conditions specified in the grant.

The court below was also wrong in finding that *Schneider* v. *Rusk*, 377 U.S. 163, forbade any impairment of citizenship status once it has attached. In that case the court struck down the provisions under which a naturalized citizen lost her citizenship by continuous residence for three years in her country of origin. The Court held that the Due Process Clause of the Fifth Amendment prohibited *unreasonable* discrimination against naturalized citizens denying them equal protection with the native born. But *Schneider* did not outlaw reasonable conditions imposed in situations not governed by the Fourteenth Amendment.

B. THE RIGHT TO ACQUIRE UNITED STATES CITIZENSHIP AT BIRTH ABROAD IS ENTIRELY STATUTORY

Legislation authorizing citizenship benefits for children born abroad stems from ancient antecedents. The original rule of the common law was the *jus soli*, under which the law of the place of birth governed citizenship status.[6] The decline of feudalism and the

[6] See Cockburn, *Nationality*, p. 7; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668–71.

developing needs of foreign commerce and intercourse, with the resultant increase in the mobility of British subjects, eventually led to the enactment of statutes, commencing in 1350, bestowing British nationality on children born abroad to natural born British subjects.[7] British law thus developed a combination of the unwritten *jus soli* and the statutory *jus sanguinis*,[8] a civil law concept, followed in most European countries, under which the nationality of the parents is transmitted by descent to their child at the moment of birth.

The development of the applicable rules in this country reflected the British experience.[9] As originally adopted, the Constitution did not define American citizenship. Various Constitutional provisions spoke, however, of citizenship in general terms,[10] and Article I, Sec. 8, cl. 4 empowered Congress to establish a uniform rule of naturalization. The failure to define citizenship may have been attributable to a desire to avoid troublesome problems, such as the relationship between State and national citizenship and the status of the Negro slaves.[11]

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[7] *Id.*; *Weedin* v. *Chin Bow*, 274 U.S. 657, 660, 668.

[8] *Id.*

[9] For general discussions of this development in the United States see *United States* v. *Wong Kim Ark*, *supra*; *Weedin* v. *Chin Bow*, *supra*; Van Dyne, *Citizenship of the United States*, 32–33.

[10] U.S. Const., Art. II, Sec. 1, cl. 5 (eligibility for Presidency—natural born citizen); Art. I, Sec. 2, cl. 2 (qualifications for members of House of Representatives—citizen of the United States); Art. III, Sec. 2, cl. 1 (Judicial power extends to controversies involving citizens of different States); Art. I, Sec. 3, cl. 3 (qualifications for Senators—citizens of the United States).

[11] See Roche, *The Expatriation Cases*, The Supreme Court Review, 325, 328 (U. of Chicago, 1963); Gordon, *The Citizen and the State*, 53 Georgetown Law Journ. 315, 318, 334 (1965).

In any event, it seems clear that the framers referred to "citizens" in the contemporary usage, primarily based on the experience of the mother country.[12]

The First Congress quickly acted to clarify citizenship status in several respects in the Act of March 26, 1790, 1 Stat. 103. Early in the consideration of this measure Mr. Burke observed that "The case of children of American parents born abroad ought to be provided for, as was done in the case of English parents in the 12th year of William III".[13] The 1790 Act provided for the acquisition of American citizenship by children born abroad to American fathers, and similar provisions have been made in the various subsequent citizenship laws, including the present statute.[14]

Until the Civil Rights Act of 1866, 14 Stat. 27, there was no statute defining the citizenship status of those born in the United States. It is now clear that the traditional rule of the *jus soli* prevailed, as a heritage from the English common law. The rule of *jus soli* was incorporated in the Fourteenth Amendment, primarily to safeguard the status of the newly emancipated Negroes. See *Afroyim* v. *Rusk,* 387 U.S. 253, 262. As the Court pointed out in *United States* v. *Wong Kim Ark,* 169

[12] See *United States* v. *Wong Kim Ark*, *supra*, 169 U.S. at 654; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 645–652 (N.Y. 1844); *Ludlam* v. *Ludlam*, 26 N.Y. 356, 361 (1863).

[13] Annals of First Congress, p. 1121. See also *Weedin* v. *Chin Bow*, *supra*, 274 U.S. at 661.

[14] See 3 Hackworth, *Digest of Int. Law*, 17. The ancestor British statutes included similar reservations, limiting to the grandchildren of natural born British subjects the right to inherit British citizenship. See *Weedin* v. *Chin Bow*, 274 U.S. 657, 661; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668–671; Dicey, *Conflict of Laws* (1st Ed.) 177; Cockburn, *Nationality* 6. Congress was aware of the British practice but, because of concern with divided alle-

U.S. 649, 688, the first sentence of the Fourteenth Amendment

> is declaratory of existing rights, and affirmative of existing law * * *. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated as it has always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

As explained by the Court in *Wong Kim Ark*, the supplementary rule of *jus sanguinis*—citizenship by descent or inheritance—was dependent entirely on statutes, which "applied only to cases coming within their purport" (169 U.S. at 668). Like its British ancestor, the citizenship law of the United States after the adoption of the Fourteenth Amendment was, and still is, a combination of the *jus soli* (Constitutional) and the *jus sanguinis* (statutory). A similar combination prevails in most countries of the world.[15]

The source of Congressional authority to legislate for citizenship by descent is not clearly identified. In *Wong Kim Ark, supra*, 169 U.S. at 688, this Court suggested that the authority derived from the constitutional power (Article I, Section 8, cl. 4) to establish a uniform rule of naturalization.[16] Another plaus-

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giance, "was not willing to make so liberal a provision". *Weedin* v. *Chin Bow*, *supra*, at 665.

[15] See *Research in International Law*, Harv. Law School (hereafter *Harvard Research*), 23 Am. Journ. Int. Law (Special Supplement) 30–32, 41–44 (1929).

[16] The difficulty with this theory is the conception, generally recognized in modern usage, that naturalization is the acquisition of citizenship *after birth*. See 8 U.S.C. 1101(a)(23); Section 101(c), Nationality Act of 1940, 54 Stat. 1137. The present statute spells out three major methods for acquiring

ible suggestion, mentioned by the court below (A. 22 n. 13), is that this legislation is a proper definition by Congress of undefined terms in the Constitution, such as "citizen" and "naturalization". A third possibility is that it is an expression of the inherent power of a state to define its citizenship. See *Minor* v. *Happersett,* 88 21 Wall. 162, 167; *Mackenzie* v. *Hare,* 239 U.S. 299, 310–12. But there is no need to choose among these various theories, since it is in any event undisputed that Congress is empowered to define the citizenship status of foreign born children of American citizens.

C. CONGRESS HAS POWER TO PRESCRIBE REASONABLE CONDITIONS FOR THE ACQUISITION AND RETENTION OF CITIZENSHIP BY CHILDREN BORN ABROAD

It is clear that Congress is under no Constitutional compulsion to grant citizenship to foreign-born children, but has plenary authority to grant or withhold citizenship, or to subject it to reasonable terms. As this Court pointed out in *Montana* v. *Kennedy,* 366 U.S. 308, 312, any citizenship claim in such cases depends on "the structure of inherited citizenship that Congress created", which is "the sole source of inherited citizenship".

There are at least two solidly endorsed historical precedents for shutting off an American citizen's capacity to transmit citizenship by descent. The first of these occurred in Section 4 of the Act of April 14, 1802, 2 Stat. 153, 155, which recognized the transmission of citizenship by descent only through "per-

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United States citizenship: (1) at birth in the United States; (2) at birth outside the United States; (3) by naturalization. See 8 U.S.C. 1401, 1421.

sons who now are, or have been citizens of the United States".[17] In 1854 Mr. Horace Binney, a distinguished legal scholar, wrote an article contending that because of this statutory language persons who had acquired United States citizenship after April 14, 1802, did not transmit citizenship by descent to their children born abroad. 2 Amer. Law Reg. 193.[18] Congress quickly remedied this omission by the Act of February 10, 1855, 10 Stat. 604, which confirmed the citizenship status of children "heretofore born, or hereafter to be born," abroad to American fathers. The importance in the present context of Mr. Binney's hypothesis is that on three occasions this Court has referred with approval to its recognition that during a period of over 50 years there was no provision for the transmission of citizenship by descent. See *United States* v. *Wong Kim Ark,* 169 U.S. 649, 673–674; *Weedin* v. *Chin Bow,* 274 U.S. 657, 663; *Montana* v. *Kennedy,* 366 U.S. 308, 311.

Another example of Congressional power over citizenship by descent was the restriction of such opportunity, until recently, to the children of American fathers. Section 1 of the Act of May 24, 1934, 48 Stat. 797, first gave American citizen mothers the right to transmit citizenship to children thereafter born. In *Montana* v. *Kennedy,* 366 U.S. 308, a person born in Italy in 1906 to an American mother and an Italian father temporarily sojourning in Italy was held not to have acquired American citizenship, even though he

[17] Sec. 4, Act of April 14, 1802, 2 Stat. 153, 155.

[18] The same hypothesis had previously been urged in 2 Kent, *Commentaries* 52. Mr. Binney did not sign the article in the American Law Register. It was later published as a separate pamphlet under the author's name.

had been brought to the United States by his parents immediately after birth and had thereafter resided in the United States. Again this Court expressed no doubt about the authority of Congress to limit the transmission of citizenship by descent, pursuant to

> * * * the structure of inherited citizenship that Congress created in 1855 and recognized and reaffirmed until 1934. On this basis and in the light of our precedents, we hold that at the time of petitioner's birth in 1906, R.S. § 1993 provided *the sole source of inherited citizenship status* for foreign-born children of American parents. That statute cannot avail this petitioner, who is the foreign-born child of an alien father. [366 U.S. at 312; emphasis added.]

The power of Congress to limit its bounty is unimpaired even if the statutes dealing with citizenship by descent are deemed naturalization statutes within the meaning of the Constitution. No one has a right to be naturalized unless he satisfies the conditions prescribed by Congress. *United States* v. *Ness,* 245 U.S. 319; *United States* v. *Ginsberg,* 243 U.S. 472; *Maney* v. *United States,* 278 U.S. 17. In the ordinary naturalization proceeding these conditions include prescribed periods of residence, good moral character, and attachment to the principles of the Constitution. *E.g.,* Sec. 316(a), Immigration and Nationality Act, 8 U.S.C. 1427(a). Similar requirements to assure that the foreign-born child of an American parent has appropriate identification with the United States are equally valid. See *Weedin* v. *Chin Bow,* 274 U.S. 657, endorsing the requirement of prior residence in the United States by the citizen parent as a condition precedent to the transmission of citizenship.

Congress unquestionably could have established the condition precedent that a child born abroad to an American parent may not acquire United States citizenship until he has satisfied a reasonable residence requirement. Such a delay in conferring citizenship is prescribed by the laws of many other countries,[19] and was actually suggested by the 1934 Act's declaration that "the right of citizenship shall not descend" until the child establishes the requisite residence in the United States. However, the administrative reading of the 1934 Act, and the explicit language of the 1940 and 1952 Acts, have conferred citizenship at birth, subject to conditions subsequent for the retention of such citizenship. See 38 Ops. Atty. Gen. 10, 16–18; *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Vol. 1, p. 9. We believe that the Congressional power was not lessened by Congress' generosity in allowing such children to enjoy citizenship benefits immediately.

If appellee had been born six years earlier he would have had no claim to American citizenship, since his mother was then incapable of transmitting it. *Montana* v. *Kennedy, supra.* Having been born after the 1934 Act, he acquired citizenship subject to the conditions

[19] Countries which provide that foreign born children acquire citizenship only if they establish residence in the parent country include Argentina, Bolivia, Brazil, Chile, Columbia, Greece, Guatemala, Honduras, Netherlands, Nepal, Nicaragua, Panama, Paraguay and Portugal. See *Laws Concerning Nationality,* U.N. Legislative Series, St/Leg/Ser. B/4; *Harvard Research,* pp. 31, 42.

for its retention fixed by Congress in the very statute from which his citizenship right emerged. It is doubtful that Congress would have chosen to extend citizenship at birth to appellee and others in his class if it was unable validly to impose the conditions which were regarded as intimate and unseverable concomitants of the grant.

The postponement of citizenship benefits for foreign born children of American parents would be inconvenient and undesirable. It is manifestly reasonable and beneficial to such children and their parents if the child is invested with the parent's citizenship immediately, subject instead to a subsequent satisfaction of reasonable requirements. We believe nothing in the Constitution or in the prior decisions of this Court demands that Congress must choose between the undesirable alternatives of conferring unconditional United States citizenship at birth on a person who may never have any contact with or allegiance to this country or deferring citizenship for such a person until he establishes such contact or allegiance.

The supposition of the court below that citizenship cannot be granted subject to any conditions overlooks at least three well established conditions to citizenship grants. In the first place, a child who acquires United States citizenship at birth abroad cannot transmit such citizenship to his descendants unless he establishes residence in the United States. In addition, this Court has declared that its decisions in the expatriation cases do not disturb the power to vitiate naturalizations obtained through fraud. See *Afroyim* v. *Rusk*, 387 U.S. 253, 267,

n. 23; *Perez* v. *Brownell,* 356 U.S. 44, 66 (dissenting opinion of Chief Justice Warren); *Schneider* v. *Rusk,* 377 U.S. 163, 166. A third example, which we shall discuss more fully, is presented by a person with dual nationality who may be required to elect between his conflicting allegiances. Concededly, conditions subsequent affecting citizenship status are unusual, but there is no basis for finding that Congress lacks the power to impose them in appropriate circumstances.

In finding that Section 301(b) is invalid under this Court's holdings in *Schneider* and *Afroyim,* the court below stated (A. 21) that

> Whatever the reason plaintiff remained abroad * * *, Congress cannot terminate his citizenship on the ground that he only enjoyed a second-class citizenship, one that restricted his right to live and work abroad in a way that other citizens may.

The court seems to have taken the sweeping view that any condition subsequent attached to a grant of citizenship creates a "second-class citizenship." We submit that the residence requirement of section 301 (b) does not create a second-class citizenship, but, instead, merely assures that the beneficiary of the citizenship status conferred by the statute will affirmatively demonstrate, in a reasonable manner, his identification with and allegiance to this country. In the words of then Representative Dirksen, discussing the 1934 amendment (see p. 31, *infra*), fulfillment of this requirement completes the "inchoate right of citizenship" which Section 301(b) bestows at a child's birth. Unlike the situation which this Court faced in *Schneider,* the provision under consideration here

does not place a permanent restriction on citizenship, but merely requires that a person make *one* showing of his attachment to this country, after which he is free to reside for the rest of his life wherever he chooses, without any threat of involuntary loss of citizenship.

Nor do we share the apparent apprehension of the court below that unless there is an absolute Constitutional preclusion of a condition subsequent appellee's citizenship status would be defenseless against arbitrary action by Congress. On the contrary, the due process mandates articulated by this Court in *Schneider* would bar any arbitrary, unreasonable, or discriminatory conditions. Conversely, due process requirements would be satisfied by reasonable conditions relating to inherited citizenship.

II. IN REQUIRING THAT A FOREIGN BORN CHILD OF AN ALIEN FATHER AND A CITIZEN MOTHER MUST ESTABLISH RESIDENCE IN THE UNITED STATES UPON ATTAINING MATURITY CONGRESS WAS PRESCRIBING A REASONABLE CONDITION TO ASSURE PRIMARY COMMITMENT TO THE UNITED STATES BY CHILDREN OF DIVIDED ALLEGIANCE

A. THE PROBLEM OF DUAL NATIONALITY

Because of the combination of the *jus soli* and *jus sanguinis* in the laws of most countries,[20] a child born to an American parent in a foreign country generally is invested with dual nationality.[21] This is particularly likely where, as here, the child's alien

[20] See note 15, p. 14, *supra*.

[21] See 3 Moore, *International Law Digest*, 525; Borchard, *Diplomatic Protection of Citizens Abroad*, 575.

father is a national of the country where the child was born, and the child continues to reside with his parents in that foreign country. Because such a child is born and reared with divided loyalties, a belief that his primary allegiance will be to the country of his birth is not unreasonable.

Blackstone referred to "the principle, that every man owes natural allegiance where he is born, and cannot owe two allegiances, or serve two masters at once". *Commentaries on the Law* (Dean Gavit's Edition), Book 1, Ch. 10, p. 157. It has generally been acknowledged that the dual national's ambivalent situation is unsatisfactory to the persons and nations concerned. The "entanglements which may stem from dual allegiance" were noted in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 187 (Brennan, J., concurring). One recent study has recorded the "widely held opinion that dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of the individuals concerned". Bar-Yaacov, *Dual Nationality* 4. And in *Kawakita* v. *United States,* 343 U.S. 717, 736, this Court declared that a dual national "cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor". The patent undesirability of dual nationality has led to many proposals to control it. See Bar-Yaacov, *supra,* at 5–6; *Harvard Research,* 30–32, 41–44.

The situation of the child who acquires dual nationality at birth to an American parent in a foreign

country has caused the most serious concern in this country. As we have noted, the first statute dealing with citizenship by descent, Section 1 of the Act of March 26, 1790, 1 Stat. 103, granted citizenship to children born abroad to American fathers, but specified that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States". Similar conditions were announced by the Acts of 1795,[22] 1802,[23] and 1855.[24] The 1855 Act was codified as Section 1993 of the Revised Statutes, which for many years was the basic law defining the citizenship of children born abroad to American parents. In *Weedin* v. *Chin Bow*, 274 U.S. 657, this Court ruled that under the prescription of R.S. 1993, citizenship could be transmitted to a child born abroad only if the citizen father had resided in the United States *prior to* the child's birth. See also *D'Alessio* v. *Lehmann*, 289 F. 2d 317 (C.A. 6), certiorari denied, 368 U.S. 822. The Court quoted with approval the observation in Borchard, *Diplomatic Protection of Citizens Abroad*,[25] that:

> This limitation upon the right of transmitting citizenship indefinitely was intended to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties.

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[22] Sec. 3, Act of January 29, 1795, 1 Stat. 414, 415.

[23] Sec. 4, Act of April 14, 1802, 2 Stat. 153, 155.

[24] Act of February 10, 1855, 10 Stat. 604.

[25] 274 U.S. at 673. Borchard referred to the similar statement in Van Dyne, *Citizenship*, 34.

It is of interest that later statutes have removed the ambiguity addressed by this Court in *Chin Bow*, and now state explicitly that the requisite residence of the parent must precede the child's birth. See Sec. 301(a)(3), (4), (5), (7), Immigration and Nationality Act, 8 U.S.C. 1401(a)(3), (4), (5), (7); Sec. 201 (c), (d), (e), (g), and (i), Nationality Act of 1940, 54 Stat. 1139, 60 Stat. 721.

B. THIS COURT HAS RECOGNIZED THAT A DUAL NATIONAL MAY CONSTITUTIONALLY BE REQUIRED TO MAKE AN ELECTION

This Court has considered problems created by dual nationality on three occasions. Since all of these cases involved dual nationals born in the United States, whose citizenship was safeguarded by the Fourteenth Amendment, they do not bear directly upon the non-constitutional citizenship considered here. Nevertheless we believe their holdings may afford some guidance.

In *Perkins* v. *Elg*, 307 U.S. 325, a native-born citizen had been taken by her parents to a foreign country, where she had acquired foreign citizenship through them by naturalization. The Court recognized (307 U.S. at 329) that she had acquired dual nationality, but that her native citizenship

> must be deemed to continue unless she has been deprived of it through operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

Moreover, the Court found (*id.*) that a native-born citizen who had acquired dual nationality during minority would not lose his United States citizenship

> provided that on attaining majority he elects to retain that citizenship and to return to the United States to resume its duties.

In *Kawakita* v. *United States,* 343 U.S. 717, a native-born Japanese who had acquired dual nationality at birth in the United States sought to defeat a prosecution for treason by contending that he had lost his United States citizenship. This contention was rejected, and the Court stated (343 U.S. at 734):

> One who becomes a citizen of this country by reason of birth retains it, even though by the law of another country he is also a citizen of it. He can under certain circumstances be deprived of his American citizenship through the operation of a treaty or an act of Congress; he can also lose it by voluntary action.

Mandoli v. *Acheson,* 344 U.S. 133, also considered the situation of a native-born American who had acquired dual nationality at the time of his birth in the United States to alien parents. The Court found that there was no statute imposing upon a dual national born in the United States a duty to elect between his two nationalities, and that he had not lost his American citizenship by failure to make an election. The Court pointed out (344 U.S. at 138) that while, in the Nationality Act of 1940, Congress had enlarged the grounds for loss of nationality, "it refused to require a citizen by nativity to elect between dual citizenships upon reaching a majority."

It appears, therefore, that in its prior decisions this Court has recognized that a dual national, even though his native birth brought him within the pro-

tection of the Fourteenth Amendment, might, at Congress's direction, be required to opt for citizenship upon attaining majority. In each instance it found that no election had taken place. But in *Elg* and *Kawakita* the Court specifically noted that an election might be required by statute. And in *Mandoli* it found that there had been no loss of citizenship because no statute required a native born dual national to opt, strongly implying that an election could be required by statute. We believe it follows, *a fortiori*, that an election required by a specific statutory mandate, particularly for a foreign-born person whose citizenship claim depends entirely on statute, is both proper and valid.

C. THE STATUTORY SCHEME REFLECTS CAREFUL CONGRESSIONAL CONSIDERATION OF THE PROBLEM OF DUAL ALLEGIANCE

The laws of the United States originally did not provide for such an election. Yet problems presented by the dual nationality of foreign born citizens were a matter of constant concern for the Department of State. Even in the absence of statute, the Department of State ruled, under "an established principle of international law" that a dual national at birth abroad was subject "to the divesting of this nationality by his election, when he arrives at full age, to accept allegiance to the country of his birth". 2 Wharton, *Int. Law Digest,* 418; Van Dyne, *Citizenship of the United States,* 38; Borchard, *Diplomatic Protection of Citizens Abroad,* 575–76.

In 1906 a Citizenship Commission consisting of three State Department officers was designated to

study possible legislation "required to settle some of the embarrassing questions that arise in reference to citizenship, expatriation, and the protection of citizens abroad". H. Doc. 326, 59th Cong., 2d Sess., p. 1. The report of the Citizenship Commission contained a number of recommendations, which later were substantially adopted in the Act of March 2, 1907, 34 Stat. 1228. Section 6 of the 1907 Act provided that all children who acquired United States citizenship by descent at birth abroad

> and who continue to reside outside the United States shall, in order to receive the protection of the Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

In explaining this new provision the Citizenship Commission pointed out (H. Doc. 326, 59th Cong., 2d Sess., p. 17) that many countries required military service at age 18, but that the policy of our government protected dual nationals until the age of 21, at which time they were permitted "to choose whether they will remain American citizens or not". The Commission found this policy defective since "our Government may be called on to protect during the period of liability to military service a person who has no intention of ever residing in the United States or performing any obligations to it." The Commission concluded that: "It would appear reasonable and

desirable to resolve this ambiguity before it has served the purpose of a person whose intention is that of disloyalty to both the governments involved".

Section 6 of the 1907 Act admittedly related only to possible loss of diplomatic protection, rather than to retention or loss of United States citizenship. 3 Hackworth, *Digest of International Law,* 24; Gettys, *The Law of Citizenship in the United States,* 29–30. Yet it is also clear that this statute was concerned with "election of citizenship by those coming to majority". *Weedin* v. *Chin Bow,* 274 U.S. 657, 668–669. As we have shown, the situation of such dual nationals had long been a matter of concern to our Government.

This concern increased when Congress enacted Section 1 of the Act of May 24, 1934, 48 Stat. 797, which, as we have noted, for the first time gave to American mothers equal rights to transmit United States citizenship to their children born abroad. Observing that such a child might be born into a household with divided allegiance, Congress provided that

> where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States * * *.

In this directive the 1934 Act went beyond its 1907 predecessor by providing that "the right of citizenship shall not descend," instead of prescribing merely for loss of diplomatic protection, and by requiring

actual residence in the United States for five years prior to the age of 18, as the primary method for demonstrating an election of United States citizenship, by a person born abroad to one citizen parent.[26] In explaining this change the House Committee noted that the bill equalized American mothers with American fathers, and

> provides that such children shall have United States citizenship on condition * * * that the child, prior to its 18th birthday, returns to the United States and resides here at least 5 years.

H. Rep. 131, 73d Cong., 1st Sess., p. 2; S. Rep. 865, 73d Cong., 2d Sess., p. 2. The 1934 Act prescribed no retention condition where both parents were United States citizens when the child was born, providing for unconditional transmission of citizenship to such a child if either parent had previously resided in the United States.[27]

The floor debates in Congress on the 1934 legislation were largely concerned with the questionable loyalty of children born abroad to an American mother and an alien father and the need to require such children to make an election between their conflicting allegiances. In the course of the House debate,

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[26] The provisions of the 1934 amendment were not retroactive. *Montana* v. *Kennedy*, 366 U.S. 308. Therefore, its retention condition did not apply to persons previously born. *Reuff v. Brownell*, 116 F. Supp. 298 (D. N.J.); *Ngow* v. *Brownell*, 132 F. Supp. 426 (E.D. Wisc.).

[27] Subsequent statutes have made similar provisions. See Section 201(c), Nationality Act of 1940, 54 Stat. 1138; Sec. 301(a)(3), Immigration and Nationality Act, 8 U.S.C. 1401(a)(3).

Representative Dickstein, Chairman of the House Committee on Immigration and Naturalization and chief sponsor of the measure, observed (78 Cong. Rec. 7330) that "these children would have to make a declaration. In other words they cannot have dual nationality." Thereafter, the following colloquy occurred (*id.*, p. 7331):

> Mr. Dickstein. * * * The gentleman, as I understand, asked me the simple question of whether there will be dual nationality of such a child if this bill is passed; in other words, such a child will have the citizenship of the father, and also under this measure he will have the nationality of the mother. Is that correct?
>
> Mr. Cox. That is correct; yes.
>
> Mr. Dickstein. * * * such a child would have to make an election at his eighteenth birthday and would have to make a declaration prior to his eighteenth birthday when he enters the United States.

Representative Millard, member of the Committee, successfully urged addition of a provision for an oath of allegiance at age 21 "because I can see where such a child might not have the best interest of this country at heart and not be willing to take the oath of allegiance and perhaps would become a bad citizen" (*id.*, p. 7333). Representative Oliver also favored an oath of allegiance at age 21 "because we do not want to grant citizenship to the child of an American mother simply because it is the child of an American mother unless it chooses to be loyal to America. * * *

The child might want to take the citizenship of the father, and it should if it feels so disposed." (*Id.* p. 7348.) Representative Dirksen discussed the dual nationality of the child and the need to establish residence in the United States "before the inchoate right of citizenship becomes complete". (*Id.* at pp. 7341–7342.)

The purpose of the condition regarding retention of citizenship is explained more fully in the report of the Cabinet Committee (consisting of the Secretary of State, the Attorney General, and the Secretary of Labor), whose five-year study eventually culminated in the Nationality Act of 1940, 54 Stat. 1137. *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess. The Cabinet Committee's expressions assume added weight, since its views were solicited and its approval obtained in the consideration of the 1934 Act. S. Rep. 865, 73d Cong., 2d Sess. In commenting on the condition subsequent introduced by the 1934 Act, the Cabinet Committee stated (*Codification of Nationality Laws,* Vol. 1, p. 9) that

> Congress seems to have realized that in extending the principle of *jus sanguinis* to cover cases of children born abroad to American women who had married aliens subsequent to Cable Act of September 22, 1922 (42 Stat. 1021)[28]

[28] The Cable Act provided that an American woman who married an alien would retain her own nationality. Under the Act of 1907 such a woman would have assumed her husband's citizenship, thereby creating a family unity of citizenship. See *Mackenzie* v. *Hare*, 239 U.S. 299.

> * * * it would be necessary to insert limitations which do not appear in section 1993 of the Revised Statutes in its original form * * *.

The Cabinet Committee found that in the more common situation a child is born abroad to American parents who are both American citizens and who are engaged in promoting American interests. The Committee declared (*id.*, p. 11) that

> In such cases it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character. This is likely to be the case where both parents are citizens of the United States.

The Cabinet Committee also proposed that the condition subsequent for retention of citizenship be made inapplicable where there was only one citizen parent, if the parent was abroad to promote specified American interests.[29] In this connection the Committee commented:

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[29] While such a reservation appeared in Section 201(g) of the 1940 Act (Appendix A, Item 6, *infra*, pp. 44–45), it was eliminated in Section 301(b) of the 1952 Act (*id.*, Item 7). When the 1952 Act was under consideration, the comments on the pending bills prepared by the General Counsel, Immigration and Naturalization Service (Analyses of S. 3455, 81st Cong. (pp. 301–7) and S. 716, 82d Cong. (pp. 301–6), which are lodged in the library of this Court), called attention to this omission, without making any specific recommendation. The Congressional committee reports made no further reference to this change, except to note that the conditions had been redefined "more realistically" in light of the many children born abroad to American servicemen who had married alien brides. The committee reports also emphasized that such children were required, in order to retain United States citizenship, to take up residence in this country before their 23d birthday. S. Rep. 1137 (pp. 38–39).

> In general, citizens of the United States residing abroad for the purposes just mentioned not only promote the interests of this country but are likely to retain their American sympathies and character. Therefore, such persons are likely, as a rule, to bring up their children as Americans, to see that they speak the English language, and to have them imbued with American ideals. The probabilities, however, would seem to be otherwise where the citizen parent who is married to an alien resides abroad for reasons having no connection with the promotion of American interests. [*Id.*, p. 14.]

For the latter group the Cabinet Committee recommended continuance of the requirement that the child must establish residence in the United States in order to retain the citizenship acquired at birth abroad. However, the Committee found the 1934 Act provision too rigid, since requiring the establishment of United States residence before age 13

> means that a child still of tender years must be separated from his parents or else that his parents, or one of them, must accompany the child to the United States and reside here with him. [*Id.*, p. 9.]

H. Rep. 1365 (p. 76), 82d Cong., 2d Sess. It is obvious that the 1952 Act deliberately reinstated the retention requirements for foreign-born children of a single citizen-parent who was abroad to promote specified American interests. Even in the absence of specific expressions, it seems proper to conclude that Congress deemed that since the time of election had been advanced to age 23, such children should be required to express their own choice in deciding whether to retain American citizenship.

Therefore the Cabinet Committee proposed to advance to age 16 the cut-off date of the child's required commencement of United States residence and to make this liberalization retroactive to births abroad subsequent to May 24, 1934, explaining that as 13 years had not yet elapsed since the 1934 Act "the requirements contained therein for retention of citizenship have not yet gone into effect, and * * * are to be supplanted by the corresponding provisions in subsection (g)". *Id.*, p. 14.

The pertinent recommendations of the Cabinet Committee were adopted by Congress in Sections 201 (g) and (h) of the Nationality Act of 1940, 54 Stat. 1139.[30] The legislative reports did not contain any additional comments on the provisions in question. See S. Rep. 2150, 76th Cong., 3d Sess., p. 4; H. Rep. 2396, 76th Cong., 3d Sess.

The provisions for retention of citizenship were further liberalized and retroactively applied to children born abroad subsequent to May 24, 1934, by Sections 301(b) and (c), Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b) and (c), which permitted the condition for retention of citizenship by the child to be satisfied by continuous physical presence of 5 years in the United States initiated prior

[30] The 1940 Act eliminated the 1934 Act's additional requirement for an oath of allegiance. Under the 1940 and 1952 Acts the establishment of residence in the United States for the prescribed period is the sole condition for retention of United States citizenship by the foreign born child of one citizen parent.

to the child's 23rd birthday.[31] A further liberalization by Section 16 of the Act of September 11, 1957, 71 Stat. 644, specified that absences from the United States of less than 12 months in the aggregate would not break the required continuity of physical presence.

D. THE RESIDENCE REQUIREMENT IS A REASONABLE CRITERION OF ALLEGIANCE TO THE UNITED STATES

In requiring that a foreign-born child establish residence in the United States when he reaches maturity, Congress has chosen a reasonable method of providing for an election by a dual national whose roots and loyalties may be entirely foreign. The statute thus prescribes two conditions to guard against divided loyalties of children born abroad. The first, designed to preclude the existence of successive generations of absentee citizens, is a condition precedent that the citizen parent must have previously resided in the United States. The second, designed to curtail dual nationality, is a condition subsequent requiring the foreign born child to make an election when he

[31] Although these retroactively liberalized provisions were proposed slightly less than 16 years after May 24, 1934, they were not enacted and effective until the end of 1952. In *Fee* v. *Dulles*, 236 F. 2d 885 (C.A. 7), the court held that the 1952 Act had not restored citizenship apparently lost by foreign born children of a single citizen parent who had become 16 years of age during the hiatus between May 24, 1950, and December 24, 1952. In this Court the Government confessed error, urging that the more liberal provisions were designed to benefit all who had been born abroad subsequent to May 24, 1934. See Respondent's Brief in Opposition, No. 58, Oct. Term 1957. This Court reversed upon the Government's confession of error. 355 U.S. 61.

attains maturity. In both instances residence in the United States is the talisman of demonstrated attachment to this country.[32]

In *Weedin* v. *Chin Bow,* 274 U.S. 657, this Court approved the statutory condition which limited inheritance of citizenship to children whose fathers had previously resided in the United States. Rejecting the attempted construction which would have conferred citizenship upon a child whose father commenced to reside in the United States after the child's birth, this Court observed (274 U.S. at 667) that such construction:

> extends citizenship to a generation whose birth, minority and majority, whose education, and whose family life, have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and responsibilities of American citizenship. * * *

While the Court's observations relate to the prior residence of the transmitting parent, they are equally relevant to the situation of the beneficiary child, reared

[32] The court below recognized "that 'jus sanguinis' may provide a tenuous link to the national state when citizenship is conferred by virtue of the citizenship of only one parent." 296 F. Supp. at 1252, n. 17. Yet it felt that "the specter of generations of child emigres" was averted by the required prior residence of the parent. Obviously the court overlooked the reasonable purpose to assure the solidity of the dual national child's link to the United States and to require him to show his attachment to this country by establishing residence here at maturity. In the estimation of Congress, this second condition was equally important to preclude the existence of a class of foreign born citizens with tenuous allegiance.

in an alien environment. Thus, the Court stated with respect to R.S. 1993 that

> It is not too much to say, therefore, that Congress at that time attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens * * *. [274 U.S. at 665.] [33]

As we have noted, a fixed period of residence in the United States has always been a prescribed condition for aliens seeking naturalization. And a native born citizen who acquires foreign citizenship through the naturalization of his parents is required to demonstrate his election of United States citizenship by establishing residence in the United States prior to his 25th birthday. See Section 349(a)(1), Immigration and Nationality Act, 8 U.S.C. 1481(a)(1); Section 401(a), Nationality Act of 1940, 54 Stat. 1168; and *Perkins* v. *Elg,* 307 U.S. 325. Moreover, the laws of many other countries similarly require establishment of residence in the parent country at maturity as a condition for retention of such citizenship.[34] And the

[33] The Court's opinion also quoted an excerpt from a communication of Secretary of State Fish to U.S. Minister Washburn, which observed that: "the heritable blood of citizenship was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship." *Id.*, pp. 665–666.

[34] Countries imposing such a condition subsequent, similar to that found in our laws, include Denmark, Finland, Iceland, Norway, and Sweden. In addition, the establishment of allegiance through registration, oath of allegiance or election is a condition for retention of citizenship by descent in Albania, Australia, Canada, Ceylon, Costa Rica, Great Britain, India,

draft international nationality code proposed by the Harvard Research in International Law similarly stipulates that a dual national at birth shall retain only the nationality of the country in which he last had his habitual residence at age 23. *Harvard Research*, pp. 41–44. The retention condition under consideration here is thus both rational and supported by abundant analogy and precedent.[35]

Japan, Liberia, New Zealand, Pakistan, South Africa and Southern Rhodesia. See *Laws Concerning Nationality*, U.N. Legislative Series, St/Leg/Ser. B/4; *Harvard Research*, p. 31.

[35] There is widespread scholarly approval of the residency requirements for acquisition and retention of citizenship by children born abroad. In discussing the practices of various nations, including the United States and England, *Harvard Research* observes (p. 31):

"It seems quite undesirable that the nationality of any state should be acquired *jure sanguinis* by unlimited generations of persons born in the territory of another state, and having the nationality of the latter under its law. While nationality is not necessarily dependent upon domicile, it is self evident that it can not be completely divorced from it. Under normal conditions most of the nationals of any state will have their habitual residence within its territory; otherwise nationality becomes meaningless."

Thereafter, in proposing a universal nationality code, including retention conditions similar to those found in our laws, the Harvard study comments (p. 42):

"It seems reasonable that a person born in a country of which his parents are not nationals should, within certain limitations, be able to choose between the nationality of the country of birth and that of his parents. On the other hand he should be required to make such choice within a limited period after reaching the age of majority, which in most countries would be twenty-one years. Varying ages of majority with reference to naturalization are found in the nationality laws of various countries, but the age of twenty-one is, perhaps, predominant.

"It is believed that the actions of the individual upon attaining majority, particularly his choice in maintaining his home

Even the court below acknowledged the reasonableness of the condition subsequent prescribed by Congress, stating, 296 F. Supp. at 1252:

> There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States. * * *

Yet the court below found that Congress was powerless to deal with this situation, except by denying citizenship benefits at birth to the foreign born child.[36] In our view Congress does have the power to deal with a dual national's split allegiance by requiring

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in one country or the other, rather than a mere declaration, should determine the nationality which he is to retain thereafter, although he should be allowed a reasonable period within which to make his decision and act accordingly. For this purpose two years seems sufficient.

"An examination of the nationality laws of the various states will show that domicile and residence play a very considerable part in determining the nationality of persons born in one state of parents having the nationality of another state."

[36] Judge Leventhal's concurring opinion (296 F. Supp. at 1253) suggested "that Congress can impose reasonable conditions that must be met before citizenship is recognized". A number of countries, chiefly in Latin America, postpone the vesting of citizenship for a foreign born child until such conditions are met. See note 19, p. 18, *supra*. *However*, as we have previously indicated (*supra*, p. 19), this is an unsatisfactory alternative.

him to elect the nationality of his choice upon reaching maturity.

As we have pointed out above, the residence requirements of Section 301(b), unlike the provision struck down in *Schneider,* cannot be held unreasonable on the ground that they are excessively burdensome. Section 301(b) does not in any way limit a person's mobility, except that it requires one affirmative showing of the kind of attachment to the United States on which the grant of citizenship is premised. Once this residency requirement has been met, no further restriction hangs over a person's citizenship. To find that this requirement is unreasonable is to say that Congress cannot simultaneously bestow the benefits of citizenship at birth on foreign-born children and yet still protect this country's interest in limiting citizenship to those persons who have at least some substantial attachment to the United States. We submit that the Constitution does not establish a right of permanent absentee citizenship.

Appellee is now 30 years of age, and has lived for most of his life in Italy, the country of his birth.[37] He became an Italian citizen at birth. He has been in this country only on five brief visits, has never lived here, and there is no indication that he will ever live in the United States. There is no contention that his failure to comply with the conditions imposed by Congress upon the grant of citizenship was due to

[37] Since appellee is concededly an Italian citizen, there is no question of statelessness here.

ignorance or mistake. It is stipulated that he was warned several times of the need to begin residence in the United States no later than his twenty-third birthday.

As a dual national born abroad who failed to take the prescribed steps to demonstrate American allegiance, appellee has probably satisfied the test of "actions in derogation of undivided allegiance to this country", suggested by Chief Justice Warren (dissenting, in *Perez* v. *Brownell*, 356 U.S. 44, 68) as an acceptable basis for relinquishment of United States citizenship.[38] Indeed, his conduct might be deemed a

[38] Although the terms used in *Afroyim* are "assent", "forcible destruction", and "voluntary relinquishes" (387 U.S. at 257, 268), earlier expressions couched this concept in somewhat different language. Thus, in addition to the "derogation of undivided allegiance" language quoted above, the dissent of Chief Justice Warren in *Perez* also referred at several points to "transfer", "abandonment", and "surrender" of allegiance. 356 U.S. at 69, 73, 76, 78. It may be significant that in *Afroyim* the Court stated (387 U.S. at 267): "we agree with the Chief Justice's dissent in the *Perez* case". The dissenting opinion of Justice Douglas in *Perez* also referred to "abandonment of * * * allegiance". 356 U.S. at 80. In his concurring opinion in *Nishikawa* v. *Dulles*, 356 U.S. 129, 139, Justice Black spoke of the right "to abandon or renounce". In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159, n. 11, the Court declared: "There is, however, no disagreement that citizenship may be voluntarily relinquished or abandoned, either expressly or by conduct." In his dissenting opinion in *Mendoza-Martinez* Justice Stewart referred to "conduct inconsistent with undiluted allegiance to this country". (p. 214) The latter observation of Justice Stewart was quoted, apparently with approval, by the Court in *Schneider* v. *Rusk*, 377 U.S. 163, 168.

voluntary relinquishment or abandonment of that citizenship.[39] In any event, we believe it is not necessary to reach these issues, since this is not a Fourteenth Amendment citizenship. We submit that Section 301(b) establishes a reasonable condition, which Congress was empowered to prescribe when it granted the title to citizenship on which appellee relies. By failing to comply with that condition, appellee has lost his right of American citizenship.

CONCLUSION

The judgment of the ~~court of appeals~~ district should therefore be reversed and the cause remanded ~~to the district court~~ with directions to dismiss the complaint.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

CHARLES GORDON,
General Counsel,
Immigration and Naturalization Service.

NOVEMBER 1969.

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[39] In *Gonzalez-Gomez* v. *Immigration and Naturalization Service* (Appendix B, *infra*, pp. 48–49), the court found that in consciously disregarding the legislative mandate the foreign born citizen "voluntarily chose not to retain his United States citizenship."

APPENDIX A

Applicable Constitutional and Statutory Provisions

1. *U.S. Constitution, Fifth Amendment.*

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

2. *U.S. Constitution, Fourteenth Amendment.*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

3. *Section 1993 of the Revised Statutes, before its amendment in 1934.*

All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

4. *Section 6, Act of March 2, 1907, 34 Stat. 1229.*

That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens

of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

5. *Section 1 of the Act of May 24, 1934, 48 Stat. 797.*

That section 1993 of the Revised Statutes is amended to read as follows:

> Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Immigration and Naturalization Service.

6. *Section 201 of the Nationality Act of 1940, 54 Stat. 1139, in pertinent part.*

The following shall be nationals and citizens of the United States at birth:

* * * * *

> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That in

order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation.

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

7. *Section 301 of the Immigration and Nationality Act, 8 U.S.C. 1401, in pertinent part.*

(a) The following shall be nationals and citizens of the United States at birth:

* * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was

physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years * * *.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided,* however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

APPENDIX B

In the United States District Court
Eastern District of California

No. F–151 Civil

VINCENTE GONZALEZ-GOMEZ, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

Memorandum and Order

The United States Court of Appeals for the Ninth Circuit remanded this case to this court pursuant to Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), to determine petitioner's claim of United States citizenship.

Petitioner was represented by Donald L. Ungar, Esq., and respondent was represented by Richard V. Boulger, Asst. United States Attorney.

It was stipulated that petitioner was a United States citizen at the time of his birth pursuant to Section 1993 of the Revised Statutes of the United States, as amended by the Act of May 24, 1934.

Petitioner was born in Mexico on July 25, 1938. His mother was and is a United States citizen, and his father, a citizen of Mexico.

Petitioner claims to have entered into the United States in 1955 and to have been here since, with the exception of visits to his mother in Tijuana.

However, petitioner has made so many contradictory statements and his demeanor on the stand gave the impression that he would testify to anything that would serve his purpose, so his testimony is entitled to very little weight.

The credible testimony establishes that petitioner considered himself a citizen of Mexico as late as 1964 and that he only visited the United States for short periods of time prior to his marriage in 1962. Thus, petitioner did not come to the United States before age 23 and be continuously physically present for five years as required by Section 301(b) of the Immigration and Nationality Act which is 8 U.S.C. 1401 (b) and (c), as he was 23 years old on July 25, 1961.

Although the Government's proof is clear and convincing, their burden of proof is only by a preponderance of the evidence as established by Congress pursuant to Section 349(c) of the Immigration and Nationality Act which is 8 U.S.C. 1481(c).

Petitioner also challenges the constitutionality of Section 301(b), alleging that it deprives him of citizenship while the Supreme Court has ruled that citizenship can only be lost by the voluntary act of the petitioner. *Afroyim* v. *Rusk,* 387 U.S. 253. This section is not unconstitutional as it applies to petitioner because Congress had the power to grant him citizenship and thus had the power to add the condition that he return and live in the United States in order to retain that citizenship. Also, petitioner was apparently aware of his dual citizenship and the requirement that he live in the United States and voluntarily chose not to retain his United States citizenship. So, it was his voluntary act that caused him to lose his status as a United States citizen.

It is therefore ordered, that petitioner is not a United States citizen.

Counsel for respondent is directed to prepare and lodge findings of fact, conclusions of law and form of judgment in accordance with the local rules of this court.

The clerk of this court is directed to serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated: June 17, 1969.

M. D. CROCKER,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1969